

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:  
  
JOHNSON & JOHNSON

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**PLAINTIFFS' RESPONSE TO THE JOHNSON & JOHNSON DEFENDANTS'  
SUPPLEMENTAL AUTHORITY**

The members of Class 1, by Class Counsel, respectfully submit this short response to the March 5 submission of the California Court of Appeal's decision in *Pfizer, Inc. v. Superior Court of Los Angeles County* by the J&J Defendants ("J&J") in support of their Post-Remand Motion for Summary Judgment against Class 1 Residents of the District of Columbia and States Other Than the Commonwealth of Massachusetts.

J&J submitted *Pfizer* for the unremarkable proposition that "a class representative proceeding on a claim of misrepresentation under California Civ. [sic] Code § 17200 must demonstrate actual reliance on the allegedly deceptive or misleading statements." Since the California Supreme Court's decision in *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009), Plaintiffs have not disputed the named plaintiffs must demonstrate reliance. *See* Dkt. No. 6834 at 27.

To the extent that the *Pfizer* court held that the class could not be certified because it included many class members were never exposed to misrepresentations challenged by the plaintiff, that decision is inapplicable because all members of Class 1 suffered harm because they

had no choice but to pay for Procrit and Remicade based on inflated AWP's. This is particularly true because "[i]t is not ... necessarily that [the named plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct.... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." *Tobacco II*, 207 P.3d at 39 (internal citations omitted).

DATED: March 15, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE**

*In re Pharmaceutical Industry Average Wholesale Price Litigation*  
Master Case No. 01-cv-12257, MDL 1456

I, Steve W. Berman, hereby certify that I am one of Class Plaintiffs' attorneys and that, on March 15, 2010, I caused a copy of ***Plaintiffs' Response to the Johnson & Johnson Defendants' Supplemental Authority*** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

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s/ Steve W. Berman  
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